American Bar Association
www.supremecourtpreview.org

Nos. 07-984 and 07-990

IN THE
Supreme Court of the United States

COEUR ALASKA, INC.,
Petitioner,
v.
SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,
Respondents.

STATE OF ALASKA
Petitioner,
v.
SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF FOR PETITIONER COEUR ALASKA, INC.

ROBERT A. MAYNARD
PERKINS COIE LLP
251 East Front St. Ste. 400
Boise, ID 83702

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
AARON D. LINDSTROM
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, DC 20036
(202) 955-8500

Counsel for Petitioner Coeur Alaska, Inc.

RULE 29.6 STATEMENT

The corporate disclosure statement included in Coeur Alaska's petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

Page

INTRODUCTION AND SUMMARY OF ARGUMENT 1

I. COEUR'S TAILINGS SLURRY INDISPUTABLY IS "FILL MATERIAL" WITHIN THE MEANING OF THE FILL RULE 6

II. THE CLEAN WATER ACT AUTHORIZES THE CORPS TO PERMIT THIS DISCHARGE 12

A. The Text, Structure, And History Of The Clean Water Act Demonstrate That EPA Performance Standards Do Not Apply To Discharges Of Fill Material 13

B. EPA's Interpretation Of Its Performance Standard Resolves Any Question Whether The Corps' Section 404 Permit Would Violate Section 306(e) 20

III. THE CORPS' RIGOROUS SECTION 404 PERMITTING PROCESS ENSURED THAT THE KENSINGTON TAILINGS PLAN RESPECTS ENVIRONMENTAL VALUES 23

CONCLUSION 28

TABLE OF AUTHORITIES

Page(s)

Cases

Auer v. Robbins, 519 U.S. 452 (1997) 22

Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).....4, 6

Chem. Mfrs. Ass'n v. Natural Res. Def. Council, 470 U.S. 116 (1985) 5

Chevron, U.S.A. v. Natural Res. Def. Council, 467 U.S. 837 (1984) 4, 14, 19

Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980).....14

Hazardous Waste Treatment Council v. Reilly, 938 F.2d 1390 (D.C. Cir. 1991) 3

HCSC-Laundry v. United States, 450 U.S. 1 (1981).....20

Kalur v. Resor, 335 F. Supp. 1 (D.D.C. 1971).....18

LaRouche v. FEC, 28 F.3d 137 (D.C. Cir. 1994) 3

Long Island Care at Home, Ltd. v. Coke, 127 S. Ct. 2339 (2007).....9, 22

Reserve Mining Co. v. EPA, 514 F.2d 492 (8th Cir. 1975).....17

S.D. Warren Co. v. Me. Bd. of Envtl. Prot., 547 U.S. 370 (2006).....16

U.S. Postal Serv. v. Gregory, 534 U.S. 1 (2001).....22

TABLE OF AUTHORITIES—CONTINUED

Page(s)

United States v. Locke,
471 U.S. 84 (1985) 6

United States v. Riverside Bayview Homes,
474 U.S. 121 (1985) 10

Statutes

5 U.S.C. § 706(2) 2, 13, 21

33 U.S.C. § 407 17

33 U.S.C. § 1251(a) 14

33 U.S.C. § 1316(e) 6, 15

33 U.S.C. § 1319 16

33 U.S.C. § 1342(a) 15, 17

33 U.S.C. § 1342(k) 15

33 U.S.C. § 1344(a) 18

33 U.S.C. § 1344(b) 15

33 U.S.C. § 1344(c) 28

33 U.S.C. § 1344(n) 16

33 U.S.C. § 1344(p) 15

Regulations

33 C.F.R. § 320.2(b) 19

33 C.F.R. § 323.2(f) 3, 6, 10

40 C.F.R. § 122.2 23

40 C.F.R. § 122.3(b) 8, 9

40 C.F.R. § 230.10(b) 16

TABLE OF AUTHORITIES—CONTINUED

Page(s)

40 C.F.R. § 230.10(c) 18

40 C.F.R. § 230.50 18

40 C.F.R. § 232.2 3

40 C.F.R. § 440.104(a) 1

40 C.F.R. § 440.104(b) 5, 25

Other Authorities

118 Cong. Rec. 33,765 (1972) 17, 18

Central Park Conservancy, Reservoir, *at* http://www.centralpark.com/pages/attractions/reservoir.html 24

Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. 31,129 (2002) ..... passim

Hearing on Clean Water Act Definition of Fill Before the Subcomm. on Clean Air, Wetlands, and Climate Change of the S. Committee on the Environment and Public Works 7

NATIONAL PARKS SERVICE, HISTORIC AMERICAN BUILDING SURVEY, PHOTOGRAPHS: WRITTEN HISTORICAL DESCRIPTIVE DATA, WEST POTOMAC PARK 14 24

Press Release, Sierra Club, Bush Administration Allows Waste Dumping in America's Rivers and Streams (May 3, 2002) 7

TABLE OF AUTHORITIES—CONTINUED

Page(s)

The Pentagon - Facts & Figures 27

Water Pollution Control; Memorandum of Agreement on Solid Waste 51 Fed. Reg. 8,871 (1986) 9

REPLY BRIEF FOR PETITIONER COEUR ALASKA, INC.

INTRODUCTION AND SUMMARY OF ARGUMENT

SEACC's defense of the Ninth Circuit's decision is, for the most part, an exercise in misdirection. It fails to provide any persuasive rationale for the Ninth Circuit's invalidation of the Section 404 permit issued to Coeur Alaska by the Corps of Engineers in accordance with the directives of Section 404 and its implementing "Fill Rule."

SEACC begins with a blatantly misleading description of Coeur Alaska's proposed tailings discharge, suggesting that Coeur's proposed tailings slurry might pollute the impounded aquatic environment with metals or even cyanide. SEACC Br. 3–4. Yet, the Corps' record of decision reveals that "[t]here will be *no* cyanide . . . added to the milling circuit," that "the tailings will *not* be a generator of acid or heavy metals," and, indeed, that "the aluminum concentrates in the tailings [are] *less* than that in the lake sediment." J.A. 360a–61a (emphasis added).

It then resorts to word games. Even though it was happy enough to refer to Coeur's proposed discharge as "mine tailings" in its complaint, *e.g.*, J.A. 460a ¶ 2, SEACC now foists on this tailings slurry the unwieldy label, "process wastewater contain[ing] significant quantities of suspended solids," SEACC Br. 2. But it is absurd to speak of a discharge that is *55% solid* by weight in terms of "suspended solids." EPA measures "suspended solids" in milligrams per liter. 40 C.F.R. § 440.104(a) (limiting total suspended solids in drainage from gold mines to 20

mg/L). According to the Ninth Circuit (J.A. 519), Coeur's mostly solid tailings slurry contains *1.64 kilograms* of "suspended solids" per liter, a substance several orders of magnitude more "solid" than envisioned by EPA's performance standards. Whatever label SEACC might place upon it, no one disputes that Coeur's tailings slurry will raise the bottom elevation of Lower Slate Lake by 50 feet.

Finally, SEACC suggests that Coeur's diligent pursuit of a Section 404 permit masks an attempt "to escape EPA effluent limitations." SEACC Br. 44. But far from "escap[ing] EPA effluent limitations," Coeur sought and received from EPA a Section 402 permit limiting discharges of effluent *from* its tailing impoundment into downstream waters. J.A. 317a. SEACC simply refuses to come to grips with the fact that EPA has *never* regulated discharges of mine tailings *into* impounded waters of the United States.

When the subterfuge is stripped away, there is left just one legal question: Whether, by issuing a Section 404 permit in accordance with the plain language of the Fill Rule's definitions of "fill material" and "discharge of fill material," the Corps acted in a manner that is "arbitrary, capricious, [or] not in accordance with law." 5 U.S.C. § 706(2). Though the Ninth Circuit perceived no challenge to the "validity of these regulations," J.A. 541a n.12, SEACC does. It maintains that it has challenged the Fill Rule, as "interpreted" by the Corps, all along. SEACC Br. 17; *see also* SEACC's C.A. Resp. to Pets. for Reh'g *En Banc* 12 ("SEACC does not challenge this regulation (unless it is misinterpreted to conflict with the Clean Water Act)").

It is not immediately clear that administrative law embraces an "as interpreted" challenge to a regu-

lation where, as here, that regulation is conceded to be a facially valid interpretation of the underlying statute. *See LaRouche v. FEC*, 28 F.3d 137, 141 (D.C. Cir. 1994) ("There is a one-word response to these arguments: '*Chevron*.'"). Nor is it clear that such a challenge differs in any meaningful respect from a challenge to the agency's interpretation of its regulation *simpliciter*. *See Hazardous Waste Treatment Council v. Reilly*, 938 F.2d 1390, 1395 (D.C. Cir. 1991) (suggesting that an agency's interpretation of its own regulation "must also meet the test of consistency with the underlying statute"). Regardless, SEACC's challenge plainly fails on its own terms.

In analyzing SEACC's "as interpreted" challenge to the Fill Rule, the first question, logically, is whether the Corps, in issuing a permit for Coeur's proposed discharge, has reasonably interpreted its own Fill Rule. The Fill Rule defines "discharge of fill material" to include specifically "overburden, slurry, or tailings or similar mining-related materials." 33 C.F.R. § 323.2(f); 40 C.F.R. § 232.2. Though SEACC concedes that regulation is "not ambiguous," and, indeed, even that Coeur's discharge "meet[s] [its] definition of 'fill material,'" SEACC Br. 20, 46, it nevertheless contends that the history of the Fill Rule demonstrates that the Corps and EPA did not intend the Fill Rule to encompass mine tailings produced by an industrial source subject to EPA effluent restrictions. *See id.* 55–57.

SEACC's reading of that regulatory history is dubious, and its contention that EPA and the Corps did not intend their Fill Rule to permit the discharge of Coeur's type of mine tailings is flatly contradicted

by numerous pre-litigation complaints that the Fill Rule would do just that.

But even if the regulatory history were exactly as SEACC now describes, its concession that the Fill Rule is "not ambiguous" would be fatal to its argument. The law is clear that if an agency's interpretation is consistent with "the plain words of the regulation," that is the end of the matter. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). Here, the Corps' interpretation of the regulation is not merely consistent with the "plain words" of the Fill Rule, but commanded by it. The Corps' interpretation of the regulation therefore must be given "controlling weight." *Id.*

SEACC's next and principal contention—that the Corps' interpretation of the Fill Rule violates the Clean Water Act by permitting a discharge that Section 306(e) prohibits—also lacks merit. SEACC acknowledges that the analysis of its statutory claim must be guided by the framework of *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842–43 (1984). SEACC Br. 20. Because it advances no argument that the Corps' interpretation fails under *Chevron*'s second step, SEACC can prevail only if "Congress has directly spoken to the precise question at issue" and resolved it in SEACC's favor. *Chevron*, 467 U.S. at 842.

Here, the "precise question at issue" is whether Congress intended discharges of "fill material" described in Section 404 to be regulated by the Section 404(b)(1) guidelines, or rather, at EPA's option, by effluent restrictions promulgated by EPA as part of the National Pollution Discharge Elimination System ("NPDES") set out in Section 402. The "traditional tools of statutory construction" (*Chevron*, 467

U.S. at 843 n.9), point overwhelmingly to the conclusion that Congress intended "fill material" to be regulated by the Corps under Section 404, subject to the water-quality requirements developed by EPA under Section 404(b)(1) and to EPA's permit veto power under Section 404(c).

At most, the assertedly categorical nature of Section 306(e)'s prohibition creates an ambiguity in "this very 'complex statute.'" *Chem. Mfrs. Ass'n v. Natural Res. Def. Council*, 470 U.S. 116, 125 (1985). For more than thirty years, EPA and the Corps have interpreted the Act to grant the Corps jurisdiction over any discharge that satisfies the prevailing regulatory definition of "fill material," and to grant EPA jurisdiction over discharges of all other pollutants. SEACC's absence of contrary argument effectively concedes that, if the Act is ambiguous, the longstanding regulatory division of labor reflected in the Fill Rule is a permissible means of resolving that ambiguity.

But even if the Act rejected that regulatory division of labor and unambiguously required the Corps to cede its Section 404 authority to regulate discharges of "fill material" whenever EPA sought to regulate such a discharge through an effluent restriction, SEACC still could not prevail in this case. SEACC's argument that the Corps' "fill material" permit violates Section 306(e) is predicated on its assertion that the "discharge from the Kensington mine's beneficiation mill is prohibited by a new source performance standard adopted by EPA"—specifically, EPA's performance standard for process wastewater from gold froth-flotation mills, 40 C.F.R. § 440.104(b)(1). SEACC Br. 20. But EPA, the agency charged with promulgating, administering,

and enforcing that performance standard, plainly disagrees, concluding that "effluent limitations guidelines and standards, such as those applicable to gold ore mining . . . *do not apply* to the placement of tailings into the proposed impoundment." J.A. 144a–45a (emphasis added).

There accordingly was no basis for the Ninth Circuit's conclusion that Coeur's proposed discharge would be "in violation of [EPA's] standard of performance," 33 U.S.C. § 1316(e), much less its conclusion that the Corps acted "not in accordance with law" when it abided by EPA's interpretation of the scope of its own effluent restriction.

I. COEUR'S TAILINGS SLURRY INDISPUTABLY IS "FILL MATERIAL" WITHIN THE MEANING OF THE FILL RULE

The Ninth Circuit held that the Corps unreasonably interpreted the Fill Rule's definition of "discharge of fill material"—defined by EPA and the Corps to include specifically placement of "slurry, or tailings or similar mining-related materials," 33 C.F.R. § 323.2(f)—to encompass Coeur's proposed placement of a tailings slurry. J.A. 546a–47a. With no answer to the "the plain words of the regulation," *Seminole Rock*, 325 U.S. at 414, or the axiom that where language "is plain and the agency's construction completely consistent with that language, the agency's construction simply cannot be found 'sufficiently unreasonable' as to be unacceptable," *United States v. Locke*, 471 U.S. 84, 96 (1985)—indeed, SEACC concedes that Coeur's tailing slurry "meet[s] the agencies' definition of fill material," SEACC Br. 20—SEACC defends the Ninth Circuit's conclusion with a subtle twist on that court's reasoning.

Where the Ninth Circuit held that the Corps' issuance of a permit to Coeur contravened "dispositive" "regulatory history," J.A. 547a, SEACC now contends that the preamble to the Fill Rule essentially applied a narrowing construction to the regulation's textual definitions of "fill material" and "discharge of fill material" that excludes any discharge from sources regulated by EPA effluent restrictions, and that the Corps' unreasonably deviated from that narrowing construction by permitting Coeur's discharge.

This supposed narrowing construction must have been quite obscure because SEACC did not assert its existence until several years after the regulation was promulgated. Quite the contrary, when the Fill Rule was first promulgated, respondent Sierra Club decried the fact that the new Fill Rule allowed Section 404 permits for the discharge of "hardrock mining waste."[1] And one month later, SEACC's counsel of record, Earthjustice, testified before a Senate subcommitee and complained that the new Fill Rule would allow mining companies "to apply for a § 404 'fill' permit from the Corps . . . *even if the waste to be discharged has an effluent limitation and would otherwise be regulated under § 402 of the law*."[2]

In fact, as the pre-litigation statements of the Sierra Club and their counsel suggest, the preamble to

---

[1] *See* Press Release, Sierra Club, Bush Administration Allows Waste Dumping in America's Rivers and Streams (May 3, 2002), http://www.commondreams.org/news2002/0503-11.htm.

[2] *Hearing on Clean Water Act Definition of Fill Before the Subcomm. on Clean Air, Wetlands, and Climate Change of the S. Committee on the Environment and Public Works*, http://epw.senate.gov/107th/Mulhern_060602.htm (2002) (statement of Joan Mulhern, Senior Legislative Counsel, Earthjustice Legal Defense Fund) (emphasis added).

the Fill Rule does not include the narrowing construction on which SEACC now relies. SEACC zeroes in on statements that the rule "is generally consistent with current agency practice" and "generally is intended to maintain our existing approach," SEACC Br. 12, 13 (quoting Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. 31,129, 31,129, 31,133, 31,135 (2002)), and claims that they demonstrate that EPA and the Corps did not intend (plain language of their regulation notwithstanding) to allow the Corps to permit this discharge. *See* SEACC Br. 56. They argue that because Coeur's tailings slurry likely would not have been deemed by the Corps to be Section 404 fill material under its previous purpose-based test, the agencies' disclaimer of "any intention to change their existing practice," must mean that they did not intend to change their characterization of—and the regulatory regime applicable to—Coeur's discharge. *Id.*

But the "approach" and "practice" that the agencies sought to maintain was not the then-uncertain boundaries of the Corps' Section 404 permit program; it was the agencies' longstanding use of the regulatory definition of "fill material" as the line of demarcation between the Corps' permit program and EPA's. For decades, EPA had recognized that "[d]ischarges of dredged or fill material . . . which are regulated under section 404" "do not require NPDES permits." *See* 40 C.F.R. § 122.3(b). Accordingly, even under the 1986 MOA, discharges of fill material that met the Corps' definition of fill material "remain[ed] subject to section 404 even if they occur[red] in association with discharges of waste meeting the criteria in the agreement for section 402 discharges." *See* Water Pollution Control; Memoran-

dum of Agreement on Solid Waste, 51 Fed. Reg. 8,871, 8,871 (1986).[3]

The preambular statements on which SEACC places most reliance are located within the agencies' explanation of their decision to "*delete*[] the exclusion contained in the proposal for discharges covered by effluent limitation guidelines or standards or NPDES permits." Final Revisions, 67 Fed. Reg. at 31,135 (emphasis added). It was in that context that the agencies explained that eliminating the exclusion would not "alter the manner in which water quality standards currently apply under the section 402 or the section 404 programs" because "EPA has *never* sought to regulate fill material under effluent limitation guidelines." *Id.* (emphasis added). Retaining the proposed exclusion, on the other hand, "would result in uncertainty with respect to the regulation of certain discharges." *Id.* Indeed, the agencies' response to comments suggests that the exclusion was deleted specifically because it "could inadvertently result in attempts by regulators . . . to have discharges excluded from section 404 coverage simply due to the presence of constituents in the material

[3] SEACC argues that the absence of a comma in 40 C.F.R. § 122.3(b) implies that "some 'fill material' discharges are *not* regulated under Section 404" and remain subject to regulation under Section 402. SEACC Br. 47. Whatever one's assessment of SEACC's view of "proper grammar," *id.* 48, it is clear that EPA has never subscribed to it. *See* Fed. Resp'ts Br. 27; *see also* J.A. 74a ("under the existing EPA definition, material that has the effect of fill, regardless of the purpose of the discharge, is deemed fill material, and as such is not regulated under the Section 402 program"). EPA's interpretation of its regulation is not remotely "plainly erroneous," and, therefore, is controlling. *See Long Island Care at Home, Ltd. v. Coke,* 127 S. Ct. 2339, 2349 (2007).

for which effluent guidelines exist" such as "mine drainage or process waste water." J.A. 45a–46a.

Rather than introduce confusion into a regulation designed to produce clarity, the agencies decided to delete the exclusion and "maintain [the] existing approach" with EPA "never" regulating discharges that satisfy the Corps' definition of fill material. Final Revisions, 67 Fed. Reg. at 31,135. SEACC cannot through this litigation "reintroduce[] into the regulation precisely what the Corps had excised," *United States v. Riverside Bayview Homes*, 474 U.S. 121, 130 (1985), particularly when to do so would upend the regulatory paradigm the Corps and EPA have jointly followed since 1973.

Although the Fill Rule did not alter the agencies' use of the regulatory definition of "fill material" as the dividing line between the Corps' and EPA's regulatory programs, it did quite clearly change the definition of "fill material." In order to "ensure a clear, effective, and consistent regulatory approach with regard to materials that have the effect of fill," the agencies reconciled their conflicting definitions of "fill material" by adopting EPA's effects-based test, and "provid[ed] a single consistent definition of the terms 'fill material' and 'discharge of fill material.'" J.A. 73a. In the final rulemaking, the agencies amended the definition of "discharge of fill material" to include explicitly "slurry, or tailings or similar mining-related materials," 33 C.F.R. § 323.2(f), to "clarify that *any* mining-related material that has the effect of fill when discharged will be regulated as 'fill material,'" Final Revisions, 67 Fed. Reg. at 31,135 (emphasis added).

But even this change in the definition of "fill material" did not materially "expand the *types* of dis-

charges that will be covered under section 404," Final Revisions, 67 Fed. Reg. at 31,133 (emphasis added), because, as the agencies explained when responding to comments on the proposed rule, "mining by-products such as those resulting from mining beneficiation or . . . processing . . . may have a slightly different physical form from the traditional rock and soil used as fill material, but . . . can have the same effect on the aquatic environment." J.A. 92a–93a. Moreover, under the Section 404(b) guidelines, the applicant is required to "demonstrat[e] that there are no less damaging alternatives to the discharge, and that all appropriate and practicable steps have been taken to avoid, minimize and compensate for any effects on the waters." Final Revisions, 67 Fed. Reg. at 31,133.[4]

Thus, while the Fill Rule clarified and shifted slightly the line of demarcation between the Corps' and EPA's permitting programs (and explained that policy shift at length), it did not change in any way the method by which that line is drawn. Now, as since 1973, it is drawn solely by reference to the regulatory definition of fill material. If the Corps determines that a discharge satisfies its definition of fill material, the discharge is regulated by the Corps

[4] SEACC claims that the agencies "not[ed] that mine tailing discharges subject to effluent limitations would remain so and that section 402 permits would still be needed for 'process water' discharges." SEACC Br. 56. SEACC must be referring to the agencies' statement that "if EPA has previously determined that certain materials are subject to an ELG under specific circumstances, then that determination remains valid." J.A. 48a. But, under the "specific circumstances" of this case, EPA has determined that its effluent restrictions "do *not* apply to the placement of tailings into the proposed impoundment." *Id.* 145a (emphasis added).

under Section 404, in accordance with the water-quality requirements set forth in the Section 404(b)(1) guidelines and subject to EPA's permit veto under Section 404(c). "EPA has *never* sought to regulate fill material under effluent guidelines." Final Revisions, 67 Fed. Reg. at 31,135 (emphasis added).

SEACC's suggested preambular narrowing construction of the Fill Rule is entirely a figment of its zealous advocacy—a reflection of what the Fill Rule might have looked like if the agencies had adopted rather than rejected the suggestions made by SEACC and the Sierra Club in their comments on the proposed rule. The plain language of the Fill Rule stands on its own, and there is no serious dispute that Coeur's tailings slurry satisfies its definitions of "fill material" and "discharge of fill material." The Corps and EPA reasonably interpreted its Fill Rule in making that determination.

II. THE CLEAN WATER ACT AUTHORIZES THE CORPS TO PERMIT THIS DISCHARGE

Abandoning any reliance on Section 301 of the Act, (what once was featured argument, *see* SEACC C.A. Br. 34, is now, belatedly, a "sideshow," *see* SEACC Br. 38), SEACC rests its statutory argument on a single contention: that the Corps' issuance of a Section 404 permit for Coeur's tailing slurry violates the Clean Water Act by permitting a discharge that Section 306(e) allegedly prohibits. That argument fails for at least two independent reasons. First, as the Corps and EPA have recognized for decades, the text, structure, and history of the Act demonstrate that even "zero discharge" Section 306 performance standards do not apply to discharges of fill material. But even if SEACC were correct that, as a general matter, Section 306 performance standards can ap-

ply to discharges of fill material and thereby displace the Corps' regulatory authority over such discharges, the Corps' issuance of its permit here to Coeur still would be "in accordance with law," 5 U.S.C. § 706(2), because EPA itself has determined that Coeur's placement of a tailings slurry into an impoundment does not violate its froth-flotation performance standard, J.A. 145a–46a. The Corps could not, "in accordance with law," reject EPA's interpretation of its own performance standard to deny Coeur the permit to which SEACC concedes it is otherwise entitled.

A. The Text, Structure, And History Of The Clean Water Act Demonstrate That EPA Performance Standards Do Not Apply To Discharges Of Fill Material

On SEACC's and the Ninth Circuit's view, if EPA promulgated Section 306 performance standards for all discharges of "fill material" from every manner of industrial and municipal source, those *regulations* would strip the Corps of its *statutory* authority over discharges of fill material and would require that all such discharges "be permitted, if at all, under section 402, not section 404." SEACC Br. 37–38. This view of the statutory scheme cannot be reconciled with its text, structure, or history and, therefore, must be rejected.

SEACC places great weight on its view of the *purposes* of the Clean Water Act, arguing that the agencies' conclusion that EPA effluent restrictions do not apply to discharges of fill material is "highly unlikely given the Act's purpose[]" of meeting a nonbinding "goal that the discharge of pollutants into the navigable waters be eliminated by 1985." SEACC Br. 30; 33 U.S.C. § 1251(a)(1). Achieving

that one of the Act's numerous legislative objectives, however, was manifestly not the purpose of *Section 404* and its grant of authority to the Corps to issue permits for discharges of fill material. In any event, this Court has made clear that it is the agencies charged with a statute's administration—not courts—that are best positioned to ascertain the "full understanding of the force of the statutory policy in the given situation." *Chevron*, 467 U.S. at 844. Here, as in the Truth in Lending Act, "a court that tries to chart a true course to the Act's purpose embarks upon a voyage without a compass when it disregards the agency's views." *See also Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980).

The "traditional tools of statutory construction"—text, structure, and history—all support the expert agencies' considered and longstanding interpretation of the statutory scheme as granting the Corps' jurisdiction over all discharges it reasonably determines to be "fill material." Conversely, none of the traditional tools remotely supports (much less unambiguously requires) the Ninth Circuit's construction of the Act, under which fill material is subject to the Corps' jurisdiction only to the extent that EPA chooses not to regulate it.

1. SEACC's principal argument is that Section 306(e) amounts to an "absolute prohibition[]," allowing no discharge in excess of EPA's performance standards. SEACC Br. 24. This is true as far as it goes—SEACC is right that Section 306(e) itself "contains no exceptions." *Id.* But as SEACC elsewhere concedes, if "section[] [306] has no application to a particular discharge, then the discharge cannot be in violation of it." *Id.* 39. Because Section 306(e) does not of its own force "prohibit[]" *any* particular dis-

charge—rather, it works in conjunction with "applicable" EPA performance standards and bans discharges "in violation of" those effluent restrictions, 33 U.S.C. § 1316(e)—Section 306 *itself* cannot answer the question whether Congress intended for Section 306 to apply to discharges of fill material. Sections 402 and 404, however, make clear that it did not.

SEACC acknowledges that the Act sets up two separate regimes for regulating discharges into waters of the United States, with discharges of "one type of pollutant, dredged or fill material," regulated by the Corps under Section 404, and discharges of all other pollutants regulated by EPA under Section 402's NPDES program. SEACC Br. 7. And SEACC readily admits that Congress "wr[ote] the two provisions differently": Under the NPDES program, discharges must comply with EPA "effluent limitations under sections 301 [and] 306," and, under Section 402(k), compliance with an NPDES permit is deemed compliance with those statutes. *Id.* 37; *see also* 33 U.S.C. § 1342(a), (k). "In contrast," under the Section 404 program, discharges of fill material are explicitly regulated according to a *different* set of EPA water-quality requirements, "the 404(b) guidelines," and, under Section 404(p), compliance with a Section 404 permit is deemed compliance with those water-quality requirements. SEACC Br. 37; *see also* 33 U.S.C. § 1344(b), (p).

This is no "implied exception[]" to Section 306's general prohibition on discharges that violate EPA performance standards. SEACC Br. 31. It is a clear and specific directive from Congress that discharges of fill material be regulated, not under ill-fitting performance standards, but under an entirely different set of substantive standards—the Section 404(b)(1)

guidelines, developed by EPA in consultation with the Corps—subject to EPA's authority under Section 404(c) to veto permits as it deems appropriate.[5]

SEACC refuses to accord any significance whatsoever to Congress's disparate treatment of fill material and other pollutants. But just two terms ago, this Court made clear that, in interpreting the Clean Water Act, courts must presume that "Congress acts intentionally and purposely" when it "includes particular language in one section of a statute but omits it in another section." *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 384 (2006). SEACC suggests no persuasive textual or structural rationale for declining to give effect to Congress's "intentional[] and purpose[ful]" decision to regulate discharges of fill material under the Section 404(b)(1) guidelines.[6]

2. The legislative history of Section 404 strongly supports the conclusion that Congress intended for discharges of fill material to be regulated by the Corps, under standards specifically tailored to the environmental concerns unique to discharges of fill

---

[5] It is true, as SEACC says (at 27), that, under the regulations establishing the Section 404(b)(1) guidelines, "the Corps must comply with other applicable laws in issuing or denying section 404 permits," *see* 40 C.F.R. § 230.10(b) (requiring compliance with, inter alia, Endangered Species Act), but SEACC fails to mention that Section 306 is *not* one of those "applicable laws."

[6] Section 404(n) is not a sufficient justification. *Contra* SEACC Br. 27–28. Section 404(n) simply saves EPA's broad authority, under Section 309 of the Act, to enforce effluent restrictions and permit conditions. *See* 33 U.S.C. § 1344(n). Nothing in Section 309 makes Section 306 performance standards applicable—or not—to particular discharges. *See id.* § 1319.

material, rather than by EPA under performance standards fundamentally incompatible with dredge and fill activities.

SEACC has no response whatsoever to the legislative history of Section 404. *See* Coeur Br. 29–31. It has nothing to say concerning the debate in Congress over whether dredge and fill activities historically regulated by the Corps should be regulated by EPA, and no alternative explanation for the compromise that emerged under which the Corps would retain primary jurisdiction over discharges of dredge and fill material, but EPA would play a significant oversight role through its development of the Section 404(b)(1) guidelines and its veto authority. Indeed, even the letter from Administrator Ruckelhaus that SEACC points to as authority (at 41–42), recognized that under the enrolled bill, "[t]he Corps shall continue to issue dredge and fill permits in accordance with criteria comparable to the EPA ocean discharge criteria"—which is to say, the Section 404(b)(1) guidelines. 118 Cong. Rec. 36,777 (1972).

SEACC instead relies on three Senators' fleeting references to litigation surrounding the Reserve Mining Company's discharge of a mostly liquid (98.5 percent) tailings slurry into Lake Superior. *See Reserve Mining Co. v. EPA*, 514 F.2d 492 (8th Cir. 1975). At the time Congress was considering the Act, Reserve had pending before the Corps an application for a discharge permit under the Refuse Act. *See* 33 U.S.C. § 407. SEACC argues that Congress's decision to convert over 20,000 pending Refuse Act permit applications into NPDES applications, *see* 33 U.S.C. § 1342(a)(5), reflects an intention that all discharges of mine tailings similar to Reserve's be

regulated by EPA under its NPDES program. *See* SEACC Br. 42–44.

As a initial matter, other than the fact that it was produced by a beneficiation mill, Reserve's discharge bears no resemblance whatsoever to Coeur's. If proposed today, Reserve's discharge could not be permitted under Section 404 for at least three reasons: (1) the unimpounded waters of Lake Superior would not qualify as a "specified disposal site," 33 U.S.C. § 1344(a); (2) the discharge of a 98.5-percent-liquid slurry likely would not raise Lake Superior's bottom elevation; and (3) the Section 404(b)(1) guidelines do not permit discharges that jeopardize drinking-water resources, *see* 40 C.F.R. §§ 230.10(c)(1), 230.50.

But even if Reserve's discharge were similar to Coeur's, SEACC's argument still would fail because Section 402(a)(5) and its scant legislative history cannot bear the weight SEACC places upon it. If the legislative record says anything at all about Section 402(a)(5), it suggests only that Section 402(a)(5) was intended to resolve, with minimal administrative burden, "the unbelievable mess" resulting from the backlog of over 20,000 discharge permit applications that had accumulated since the Corps' Refuse Act regime had been judicially invalidated. 118 Cong. Rec. 33,765 (statement of Rep. Clark); *see also Kalur v. Resor*, 335 F. Supp. 1 (D.D.C. 1971) (invalidating Corps' Refuse Act regulations). Nothing in the congressional debates even remotely suggests Congress intended Section 402(a)(5) to fix for all time the regulatory regime to be applied to Reserve's discharge or any other discharge previously permissible under the Refuse Act. And, indeed, nothing in Section 402(a)(5) precluded Refuse Act applicants from seek-

ing permits for their discharge under other provisions of law, including Section 404. Section 402(a)(5) thus hardly can be considered evidence that Congress considered the question precisely at issue here, much less resolved it in SEACC's favor.[7]

3. In short, all the traditional tools of statutory construction point in one direction: toward the conclusion that Congress intended that discharges of fill material be regulated by the Corps according to the Section 404(b)(1) guidelines rather than by EPA, according to its Section 306 performance standards. SEACC makes much of the absence of explicit statutory language making clear that EPA performance standards do not apply to discharges of fill material. *See* SEACC Br. 33. But the *absence* of such explicit language would mean, at most, that Congress was *silent* on the specific issue of how Section 404's authorization and Section 306(e)'s prohibition interrelate. Where a statute is silent, a reviewing court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by administrator of an agency." *Chevron*, 467 U.S. at 843–44.

There can be no doubt that the Corps' and EPA's longstanding joint interpretation of the statutory scheme—that discharges satisfying the Corps' definition of "fill material" are regulated by the Corps un-

[7] Nor did Section 402(a)(5) implicitly limit "fill material" to the "'work' or 'structures' in navigable waters" permitted "under section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403." SEACC Br. 41. That would have made the Corps' Section 10 permit program obsolete, yet it remains active today. *See* 33 C.F.R. § 320.2(b). It also would have authorized fill material permits without reference to the applicability of EPA performance standards and thus defeated SEACC's argument here.

der Section 404, and "never" by EPA under effluent guidelines—is reasonable. SEACC essentially concedes the point when it urges the Court to "defer to the reasonable interpretation of the Act adopted by EPA and the Corps when they adopted the [Fill Rule]." SEACC Br. 46. And rightly so, for an agency's interpretation of an ambiguous statute surely falls within the wide range of permissible constructions when it is consistent with (if not required by) the "basic principle of statutory construction that a specific statute . . . controls over a general provision"—a principle that applies with particular force when two statutory provisions are "interrelated and closely positioned, both in fact being parts of" a single statutory scheme. *HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981). Here, it cannot be seriously disputed that Section 404 is more specific to the regulation of discharges of fill material than the "blanket prohibition[]" of Section 306(e) that assertedly applies to "*any*" and "*all*" discharges. J.A. 532a, 530a. Any ambiguity lurking within the Act on the question whether particular discharges of fill material are to be regulated under the Section 404(b)(1) guidelines or EPA performance standards has been jointly, reasonably, and continuously resolved by the Corps and EPA by reference to the regulatory definition of fill material.

B. EPA's Interpretation Of Its Performance Standard Resolves Any Question Whether The Corps' Section 404 Permit Would Violate Section 306(e)

Even if SEACC's interpretation of the Act were correct, it would not follow that the Corps' issuance of a discharge permit to Coeur was "not in accordance with law." 5 U.S.C. § 706(2)(A). SEACC's con-

tention that Coeur's discharge of fill material violates Section 306(e) hinges on its assertion that Coeur's proposed discharge would violate EPA's froth-flotation performance standard. EPA, however, expressly determined otherwise.

In response to inquiries concerning "Clean Water Act . . . regulation of . . . discharges of mine tailings from the proposed Kensington Mine," but before SEACC initiated this litigation, EPA's Office of Water published an authoritative memorandum that concluded that "effluent limitations guidelines and standards, such as those applicable to gold ore mining (*see* 40 C.F.R. Part 440, Subpart J) *do not apply* to the placement of tailings into the proposed impoundment." J.A. 144a–45a (emphasis added).[8] And in its brief to this Court (which was signed by EPA, in addition to the respondent agencies), the government has reaffirmed that position. *See* Fed. Resp'ts Br. 28, 41. In the absence of any challenge to EPA's agency action—SEACC did not name EPA as a defendant—EPA's determination is presumed valid and must be regarded as controlling of the question whether Coeur's discharge of fill material would violate EPA's performance standard. *See U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001) ("a presump-

[8] Instead, consistent with the statute, its own regulations, and long-standing practice, EPA determined that such performance standards would apply to any effluent discharged *from* the impoundment into downstream waters, and be regulated at that point under Section 402. J.A. 144a–45a. Contrary to SEACC's suggestion, upholding Coeur's Section 404 permit will not nullify froth-flotation and other performance standards; EPA will continue to apply such standards to discharges *from* tailings impoundments.

tion of regularity attaches to the actions of Government agencies").

Even if SEACC had challenged EPA's determination, this Court still would have to defer to EPA's interpretation of its own performance standard unless it was "plainly erroneous or inconsistent with the regulation." *See Long Island Care,* 127 S. Ct. at 2349 (according deference to internal department memorandum); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (according deference to interpretation stated in legal brief). SEACC cannot possibly sustain that burden; EPA's conclusion that its performance standard for process wastewater does not apply to discharges of fill material is unassailable.

Indeed, SEACC implicitly concedes the point. In attempting to distinguish the Red Dog and Fort Knox mines, SEACC acknowledges that, in both instances, mine tailings were placed in jurisdictional waters and wetlands to build impoundment structures. SEACC Br. 53. SEACC offers that "[d]ewatered tailings are sometimes used as a construction material in dams at mines," *id.* at 53 n.16, but what SEACC fails to explain is that—particularly in southeast and other wet areas of Alaska—mine tailings can never be completely "dewatered." *See* Pacific Legal Foundation, *et al.*, *Amicus Curiae* Br. 17. Even after energy-intensive drying processes, measurable amounts of "process wastewater" will remain entrained in the largely solid tailings. *See* J.A. 192a ("tailings would be dewatered . . . to a moisture content of 5 to 18 percent"). If, as SEACC has asserted, the presence of *any* amount of water in contact with mine tailings allows SEACC to label the mixture "process wastewater with significant quantities of suspended sol-

ids" and subjects that discharge to EPA effluent restrictions, then the Corps could not have permitted the discharge of the "[d]ewatered tailings" at Red Dog or Fort Knox.[9]

The applicability of EPA effluent restrictions to mine tailings cannot turn on the extent to which they are "dewatered." It instead turns, as it always has, on whether the discharge satisfies the regulatory definition of fill material—whether the Corps' previous purpose-based definition applicable when the Red Dog impoundment was constructed, or the Fill Rule's effects-based definition applicable to Coeur's tailings slurry today.

III. THE CORPS' RIGOROUS SECTION 404 PERMITTING PROCESS ENSURED THAT THE KENSINGTON TAILINGS PLAN RESPECTS ENVIRONMENTAL VALUES

SEACC tars Coeur's tailings slurry as toxic and chemically harmful to the environment, but Coeur's mine tailings will change Lower Slate Lake in exactly the same manner as a discharge of "clean" dirt: they will cover the bottom of the lake. This discharge of fill material will have real impacts—it will raise the bottom elevation of the lake by 50 feet and

---

[9] SEACC suggests that the placement of mine tailings for the Red Dog and Fort Knox mines was permitted only because those impoundments were deemed non-jurisdictional "waste treatment systems." SEACC Br. 53–54; *see also* 40 C.F.R. § 122.2 (providing that "waste treatment systems" are "not waters of the United States"). But the tailings used *to build* the impoundment structures indisputably were placed in jurisdictional waters, which is why their placement required a Section 404 permit. And as explained by EPA, the Fill Rule regulates tailings discharges *into* impoundments more effectively than the waste-treatment-system provision does. J.A. 145a–46a.

nearly triple its surface area—but these are exactly the type of impacts that the Corps has long been charged with evaluating. Using this expertise, the Corps—acting in consultation with numerous other federal and state agencies—evaluated Coeur's tailings alternatives under the Section 404(b)(1) guidelines and correctly determined that the placement of the Kensington tailings in Lower Slate Lake was the "least environmentally damaging practicable alternative." J.A. 354a. This process, and the EPA's authority to veto the permits it produces, demonstrates that the Ninth Circuit's strained reading of the Act and its rewriting of the Fill Rule is, aside from being incorrect, unnecessary.

Lower Slate Lake is one of an abundance of similarly-sized, isolated ponds in Southeast Alaska. Covering only 23 acres, it is approximately one-fifth the size of the Potomac Tidal Basin or the Reservoir in New York City's Central Park.[10] Though relatively small in surface area, Lower Slate Lake is unusually deep—so deep that only the top half of the lake can sustain aquatic life. J.A. 134a, 137a. The unproductive depths of the lake are a site where the large quantity of tailings inevitably produced by a hardrock mining operation like Kensington can be stored with minimal environmental impact.

The Corps-approved plan to impound and fill in the unproductive portion of the lake is equivalent to

---

[10] *See, e.g.*, NATIONAL PARKS SERVICE, HISTORIC AMERICAN BUILDINGS SURVEY, PHOTOGRAPHS: WRITTEN HISTORICAL DESCRIPTIVE DATA, WEST POTOMAC PARK 14, *available at* http://lcweb2.loc.gov/pnp/habshaer/dc/dc0800/dc0802/data/dc0802.pdf (107 acres); Central Park Conservancy, Reservoir, *at* http://www.centralpark.com/pages/attractions/reservoir.html (106 acres).

those it previously approved as "specified disposal sites" under Section 404 for the Red Dog and Fort Knox mines. *Compare* J.A. 360a–61a, *with* C.A. J.S.E.R. 1097, 991. The plan authorizes an impoundment in jurisdictional waters for the storage of mine tailings, with the naturally flowing waters diverted around the impoundment. Tailings are placed into the impoundment in a slurry form, and water is recycled back to the mill via a return pipeline. *Id.* 293a–94a. *See* Pacific Legal Foundation *Amici Curiae* Br. 14 (diagram). Discharges *from* the impoundment are strictly regulated under EPA's Section 402 NPDES permit program. As provided under the "zero discharge" performance standard, Coeur's Section 402 permit limits the discharges from the tailings impoundment to an amount equivalent to naturally occurring "net precipitation," *see* 40 C.F.R. § 440.104(b), and requires even that limited amount of water to be treated prior to discharge, J.A. 294a, 373a.

Contrary to SEACC's suggestions, the tailings slurry placed *into* the impoundment is fundamentally inert. The Corps found that "the aluminum concentrates in the tailings [are] less than that in the lake sediment" and there is "a low potential for chromium to be a risk to aquatic life." J.A. 361a. While elevated pH levels in the immediate vicinity "around the discharge pipe" likely would be harmful to aquatic life in that vicinity, fish will naturally avoid the area of higher pH, C.A. E.R. 370, and the elevated pH levels will "dissipate very rapidly," J.A. 360a (Corps Revised ROD). As for the other chemicals and minerals added to the tailings slurry, the district court found (correctly) that they "are not toxic and are expected to have no effect on water quality other than the benefit of enhancing the set-

tling of the fine material." *Id.* 482a. If aquatic plant or fish life is lost, it will be because the tailings covered the plant life—a natural and necessary consequence of the filling of wetlands or most bodies of water—which, in turn is the food source for the resident fish. *Id.* 129a, 361a. After remediation, the lake is expected to "provide at least equivalent aquatic habitat and productivity as it does currently." *Id.* 484a.[11]

While disposing of the tailings in Lower Slate Lake will *increase* the size of the lake and cause only temporary aquatic losses, any upland storage of the tailings in a dry stack configuration would result in a *permanent loss* of substantial acres of wetlands. J.A. 365a–66a. The first step in creating a dry stack would be to fill in anywhere from 34 to 113 acres of wetlands with "clean" rock and dirt (fill that although purchased from a local quarry likely would be substantially similar in composition to Coeur's mine tailings)—a permanent wetlands loss that is up to five times the size of Lower Slate Lake. C.A. J.S.E.R. 859–61. The tailings would then be dried to the extent possible and stacked on top of the non-jurisdictional filled wetlands. J.A. 192a–93a.

The resulting dry stack would be "highly visible from Lynn Canal, the only Visual Priority Travel Route (VPTR) impacted by project components." J.A.

---

11 "[A] non-diverse, sparsely populated, assemblage of small fish," specifically approximately 1,000 fresh-water Dolly Varden char and an undetermined number of three-spine stickleback, may be lost as a result of the filling of the lakebed. J.A. 129a, 197a–98a. These fish are not threatened species, nor, according to the Corps' Section 404(b)(1) Guidelines Evaluation, are there any endangered or threatened species in Lower Slate Lake. *See Id.* 381a, 392a.

220a. It would reach from 150 to 200 feet high, C.A. E.R. 327, and would extend, depending on which option were used, from 1200 to 2000 feet in both width and length, C.A. J.S.E.R. 669–70. The dry stack facility would dwarf the Pentagon, standing twice as high and potentially covering almost three times as many acres. *See* The Pentagon - Facts & Figures, *at* http://pentagon.afis.osd.mil/facts-area.html (77 feet tall and 34 acres in area).[12]

As part of the Section 404(b)(1) review of these competing alternatives, the Corps concluded that Coeur's proposed aquatic tailings impoundment was environmentally preferable to any dry stack alternative. J.A. 366a. Specifically, the Corps concluded that, after reclamation, the lake will become a "functioning emergent wetland/vegetated shallows lake complex, including 15 acres of emergent wetland/vegetated shallows as part of a 62 acre lake, [that] is more valuable to the aquatic ecosystem than a permanently filled wetland . . . that has lost all aquatic functions and values." *Id.* 361a. As detailed by *amicus curiae*, this evaluation process, in which EPA retains a significant oversight role, is thorough, site-specific, and fully addresses environmental considerations. *See* Nat'l Ass'n of Homebuilders *Amicus Curiae* Br. 17–32. And on top of that, Congress has

[12] The "paste" tailings alternative referenced by SEACC (at 19) is not described in the record because it was first considered only after the decision of the court of appeals. It shared many of the same environmental flaws as the dry stack alternative; the principal difference was the consistency of the tailings. SEACC Opp'n to Pets. for Writ of Cert. 10. Coeur terminated the permitting process for a paste tailings facility when it became apparent that that process inevitably would involve further lengthy and costly permitting delays or lengthy and costly litigation to defend permits, or both.

reserved to EPA the authority to veto any Section 404 permit. 33 U.S.C. § 1344(c). Here, after carefully examining the proposed discharge and commenting on the concerns it initially had, *see, e.g.*, J.A. 371a–74a, EPA declined to veto the permit. This is a robust review process, and SEACC's attempt to portray Section 404 permits as an escape valve for polluters is implausible.

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded to the court of appeals with instructions to vacate immediately the injunction pending appeal and to affirm the judgment of the district court.

Respectfully submitted.

ROBERT A. MAYNARD
PERKINS COIE LLP
251 East Front St. Ste. 400
Boise, ID 83702

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
AARON D. LINDSTROM
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, DC 20036
(202) 955-8500

Counsel for Petitioner Coeur Alaska, Inc.

December 8, 2008